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BRIEFS

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IN THE

Supreme Court of the United States

MICHELLE K. LEE, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE,

Petitioner,

v.

SIMON SHIAO TAM,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, Inc., is a nonprofit consumer advocacy organization that appears on behalf of its nationwide members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has long played a role in the development of commercial-speech doctrine. Public Citizen has defended commercial-speech regulations in cases where those regulations were important to protecting public health or served other important public interests, such as in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), and *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015). Its attorneys have also represented parties seeking to invalidate overbroad commercial-speech restraints that harmed competition and injured consumers, including in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

Public Citizen has become increasingly concerned that overly stringent applications of commercial-speech doctrine may stifle legitimate economic regulatory measures and protections for consumers. This case implicates that concern because the respondent advocates application of strict scrutiny to a law that, if it regulates or burdens speech at all, does so only with respect to *commercial speech*. The application of strict scrutiny to commercial-speech regulations would

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for both parties are on file with the Clerk.

wrongly tilt the First Amendment balance against laws and regulations that serve important public interests.

In addition, Public Citizen has in recent years become involved in cases in which trademark holders have sought to use those marks to suppress noncommercial speech critical of the mark-holder or its products or services, particularly speech on the internet. Public Citizen's experience in those cases has confirmed its conclusion that the proper realm of trademark law is the regulation of commercial speech. When it strays outside that realm, trademark law may pose significant obstacles to freedom of speech; within that realm, its application to commercial uses of marks should be governed by the standards applicable to commercial-speech regulation generally.

Because the government's defense of the statute rests on the argument that it does not regulate or burden speech, the parties' arguments may suggest an all-or-nothing choice between no First Amendment scrutiny and the strict scrutiny applicable to content-based regulation of fully protected speech. Public Citizen submits this brief to advocate another possibility: that if the Court were to find that the statute regulates or burdens speech, the affected speech would be commercial speech, and thus the statute would be subject only to the intermediate scrutiny applicable to laws regulating commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Public Citizen believes that this view may be helpful to the Court as it considers the important issues posed by this case.

SUMMARY OF ARGUMENT

The positions staked out by the parties in this case could hardly be further apart. According to the government, the Lanham Act's prohibition on the registration of disparaging trademarks, 15 U.S.C. § 1052(a), neither regulates nor burdens speech. Thus, the government argues, the prohibition is not subject to any level of First Amendment scrutiny at all, but only to the rational-basis review applicable to laws that regulate or affect commerce without implicating fundamental rights. Pet. Br. 48.

By contrast, the respondent, Mr. Tam, asserts that the statute is a content- and viewpoint-based regulation of fully protected speech, subject to strict scrutiny under the First Amendment. Resp. Br. Opp. 23, 25, 29. Alternatively, he appears to argue that even if the statute is viewed as affecting commercial speech, its content-based nature should subject it to strict scrutiny. Resp. Br. Opp. 25, 29. Laws that survive First Amendment strict scrutiny are rare. *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666–67 (2015). The government did not contend below, and does not appear to argue now, that this law is one of them. *See* Pet App. 23a–24a; Pet. Br. 48–50.

The parties' positions, however, do not exhaust the possible ways to answer the question that this Court issued the writ of certiorari to answer: "Whether the disparagement provision of the Lanham Act ... is facially invalid under the Free Speech Clause of the First Amendment." In particular, even assuming, contrary to the government's argument, that the statute does burden speech sufficiently to require First Amendment scrutiny, it does not follow that strict scrutiny applies. Rather, if assessed under the First

Amendment, the statute's constitutionality should be assessed under *Central Hudson*'s intermediate scrutiny standard for restrictions on commercial speech.

This Court has recognized repeatedly that trademarks and, more generally, trade names are a form of commercial speech. *See S.F. Arts & Athletics, Inc.* v. *U.S. Olympic Comm.*, 483 U.S. 522 (1987); *see also Friedman v. Rogers*, 440 U.S. 1 (1979). Moreover, trademark protection operates by permitting the mark-holder to restrain the commercial speech of competitors. *See, e.g., Taubman Co. v. Webfeats*, 319 F.3d 770 (6th Cir. 2003). To the extent that the prohibition on registration of disparaging marks burdens the mark-holder, it is only by limiting to some extent the ease with which he may use the mark to achieve that commercial objective.

Because the law affects the commercial-speech rights of the mark-holder and his commercial competitors, the First Amendment scrutiny to which it is subject should not exceed the level of scrutiny applicable to commercial-speech restrictions generally. That level of scrutiny is *Central Hudson*'s intermediate scrutiny, under which a substantial, not compelling, governmental interest suffices, *see* 447 U.S. at 566, and a law must be tailored to advance that interest directly, but need not do so in the least restrictive manner possible. *See Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476–77 (1989).

Intermediate scrutiny applies to commercial-speech regulations even when they may be characterized in a broad sense as content-based. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). Regulations of commercial speech are inherently dependent on the content of the speech subject to them; indeed, the cat-

egory of commercial speech is itself defined by the content of the speech. A holding that *Central Hudson*'s intermediate scrutiny must be supplanted by strict scrutiny whenever a commercial-speech restriction can be characterized as content-based would contradict decades of this Court's precedents, render *Central Hudson* a dead letter, and greatly impair the government's ability to engage in economic regulation.

ARGUMENT

Both parties to this case present arguments that, if accepted, would avoid the need to address the applicable level of First Amendment scrutiny. Consideration of the applicable level of First Amendment scrutiny would, of course, be unnecessary if the Court were to hold that the disparagement provision does not restrict or burden speech at all, as the government argues. *See* Pet. Br. 20–43. Likewise, the case would not present First Amendment issues if Mr. Tam's mark is not disparaging under the statute because he seeks to reclaim and turn to other uses a term that originated as one of disparagement, as Mr. Tam argued in his brief in opposition to the government's petition. *See* Resp. Br. Opp. 13–21. This brief will not attempt to improve upon either sides' arguments on those points.

Assuming, though, that the statute applies to this mark, and that its application affects Mr. Tam's speech in a way that calls the First Amendment into play, this Court must confront the question of what level of First Amendment scrutiny applies. As this Court's decisions reflect, determining at the outset the appropriate level of scrutiny based on the nature of the speech at issue is typically essential to arriving at the correct result in a First Amendment case. *See*,

e.g., *Williams-Yulee*, 135 S. Ct. at 1664–65; *Fox*, 492 U.S. at 473–74; *Cent. Hudson*, 447 U.S. at 561–66. In this case, however, neither party adequately comes to grips with that issue.

The government points out that "trademarks are 'commercial speech' and receive 'a limited form of First Amendment protection.'" Pet. Br. 48 (quoting *S.F. Arts*, 483 U.S. at 535). Beyond the "see generally" citation to *Central Hudson* that follows that statement, however, the government does not flesh out the point. Mr. Tam, on the other hand, contends that the statute is a content-based burden on fully protected speech subject to strict scrutiny, *see* Resp. Br. Opp. 23, and, alternatively, that, even if commercial speech is at issue, the statute remains subject to strict scrutiny because it is content-based, *see id.* at 29.

The government's position comes nearer the mark but does not carry the point to its conclusion: If the Court decides First Amendment scrutiny is required, the appropriate standard must be intermediate scrutiny under *Central Hudson*. To the extent that the law here has an impact on speech, that speech is commercial, and the application of the strict scrutiny that Mr. Tam advocates is unwarranted.

I. To the extent the statute restricts or burdens speech, the speech at issue is commercial speech.

A. Trademark law regulates commercial speech.

The essential characteristic of a trademark is that it is a word, set of words, or image that denotes goods or services offered in commerce. The legal protections afforded trademarks affect the owner's commercial

interests. Trademark protection exists to achieve the economic objective of giving "a limited property right in [a] word" that has "acquire[d] value 'as the result of organization and the expenditure of labor, skill, and money'" by the mark-holder. *S.F. Arts*, 483 U.S. at 532 (quoting *Int'l News Serv. v. Assoc. Press*, 248 U.S. 215, 239 (1918)).

The purpose of trademark protection is not to advance the mark-holder's expressive interests, but to maintain the integrity of the marketplace, protect businesses' investment in the goodwill attaching to their marks, and "protect the ability of consumers to distinguish among competing producers." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985); *see also Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1992). As Congressman Lanham stated, "The purpose of [the Act] is to protect legitimate business and the consumers of the country." 92 Cong. Rec. 7524 (1946). The Senate Report on the Lanham Act made the same points, *see* S. Rep. No. 79-1333, at 3–4 (1946), which are reiterated in the legislative history of the 1988 amendments to the Act, *see* S. Rep. No. 100-515, at 4 (1988).

Trademark laws achieve those market- and consumer-protective purposes by creating rights "to distinguish the good or property [of] the person whose mark it is, to the exclusion of use by all other persons" in the commercial arena. *S.F. Arts*, 483 U.S. at 534 (quoting *Trade-Mark Cases*, 100 U.S. 82, 92 (1879)). In regulating the extent of such rights in words used for commercial speech, trademark law's "application is to commercial speech." *Id.* at 535; *see also Friedman*, 440 U.S. at 11 (holding that use of

trade name to denote a business is commercial speech).

Moreover, trademark protection achieves its commercial ends by *suppressing* other commercial speech—namely, the use of the mark in commerce by the mark-holder's competitors or by other actors whose commercial uses of the mark cause consumer confusion or dilute the mark's commercial value.[2] As Judge Wilkinson has explained, trademark laws "restrict speech in order to promote the government's interest in protecting consumers from confusing misappropriations of product identifications." *Radiance Found., Inc. v. NAACP*, 786 F.3d 316, 321 (4th Cir. 2015).

Because "[t]rademark protection comes at a potential cost to free expression," *id.*, trademark infringement and dilution actions under the Lanham Act are, as a general matter, carefully confined to uses of a mark in commercial speech. *See id.* at 421–25; *Taubman*, 319 F.3d at 774; *see also Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 515–20 (7th Cir. 2014) (allowing Lanham Act claims based on uses of mark in commercial speech); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 904–07 (9th Cir. 2002) (denying Lanham Act claims based on uses of mark in noncommercial speech).

Trademark law, as so confined, represents little threat to First Amendment values because the com-

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[2] *See* 15 U.S.C. §§ 1114 (right of action for trademark infringement); 1116 (injunctive relief for violations of trademark rights); 1117 (damages for violations of trademark rights); 1125(c) (injunctive relief and other remedies for trademark dilution).

mercial speech to which it applies receives less extensive constitutional protection than the fully protected speech that is generally outside trademark law's purview. *Radiance Found.*, 786 F.3d at 321–22. As one court has put it, the "Lanham Act is constitutional because it only regulates commercial speech, which is entitled to reduced protections under the First Amendment." *Taubman*, 319 F.3d at 774; *see also S.F. Arts & Athletics*, 483 U.S. at 536.[3] Insofar as the Act adjusts the commercial interests of those who use marks in the marketplace, the limitations it places on both mark-holders and other market participants are properly viewed as commercial-speech regulations.

B. The Lanham Act's limitations on commercial trademark rights do not burden pure speech.

Mr. Tam asserts that the Lanham Act's disparagement provision is subject to strict scrutiny because, in limiting to some degree the commercial-law protection afforded his use of the name "The Slants" to denote the name of his band, the provision has burdened his expressive interests in using that name to make points about racism. Resp. Br. Opp. 2–4, 21. Paradoxically, however, the trademark protection Mr. Tam seeks is the ability to prevent anyone else from engaging in precisely the same expression for which he claims full First Amendment protection. Trade-

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[3] Although this Court held in *San Francisco Arts* that constitutional limits on the rights of mark-holders may be somewhat broader than the limits of the Lanham Act, it also emphasized that the constitutionality of laws governing use of marks for commercial and promotional purposes is determined by commercial-speech analysis. *See* 483 U.S. at 540.

mark law, after all, achieves its purposes by granting the mark-holder the right to exclude competitors from using the mark in commerce, *see S.F. Arts*, 483 U.S. at 534, and Mr. Tam acknowledges that acquiring "powerful tools" to prevent other bands from engaging in the same speech (that is, marketing themselves as "The Slants") is the point of registering his trademark. Resp. Br. Opp. 23. If Mr. Tam were correct that burdening the right to use that name in commerce is a restriction of pure speech calling for strict scrutiny, the argument would suggest that a decision to *grant* Mr. Tam a trademark—which would not merely burden similar speech by others, but prevent it outright—should be subject to strict First Amendment scrutiny as well.

To avoid such conundrums, the Court should reiterate that laws delineating the scope of trademark protection address commercial speech—both that of mark-holders and that of rival commercial speakers who may be accused of infringing or diluting mark-holders' rights. *S.F. Arts*, 483 U.S. at 535. To the extent such laws are properly limited to uses of trademarks in commerce, First Amendment challenges to their definitions of the scope of trademark rights or of the matter appropriate for trademark registration or protection thus should be considered under the standards applicable to commercial-speech regulations. *See id.*

This Court's decision in *San Francisco Arts* underscores the point. The Court there upheld the special statutory grant to the U.S. Olympic Committee (USOC) of exclusive rights to the word "Olympic" in the marketplace, even though some uses of the word to promote athletic or theatrical events might "go be-

yond the 'strictly business' context." 483 U.S. at 583. The Court held that because the Act primarily affected commercial speech and only "incidental[ly]" affected noncommercial expressive interests, any such incidental burden did not call for the scrutiny applicable to a direct restraint on fully protected speech, *id.* at 536–37 & nn. 15–16, and was justified by the substantial interest in securing to the USOC the "commercial value of [its] marks" and its "legitimate property right." *Id.* at 539, 541. *San Francisco Arts* directly contradicts Mr. Tam's argument that any incidental effect the regulation of his commercial and property rights in a mark may have on his expressive interests takes the law outside the bounds of commercial speech.

Adhering to the view that trademark laws regulate commercial speech would not suggest that the government could prohibit artists, journalists, musicians, writers, scholars, publishers, entities engaged in political or social advocacy, and others engaged in fully protected speech from calling themselves names of which the government disapproves. Any such laws would constitute restrictions of fully protected speech (even if those subject to them made money from their speech, *see Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 801 (1988)) and would be subject to strict scrutiny. The same would be true of laws that denied persons or groups trademark protection because of government disapproval of speech other than the mark itself. *Cf. Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668 (1996) (holding that the government may not deny access to government benefits because of disapproval of a person's speech).

The law at issue here, however, is very different from those examples. It does not prohibit Mr. Tam from calling his band "The Slants" or penalize him because of the content of his songs. The law affects only consequences of the use of the name in commerce as a trademark, and any burden the law imposes is only on Mr. Tam's ability to claim exclusive rights to profit from the name in the marketplace. Because it is so limited, the commercial-speech regulation is not "inextricably intertwined" with regulation of pure speech, *see Fox*, 492 U.S. at 474; *Jordan*, 743 F.3d at 520–22. Accordingly, to the extent such a law is considered a regulation of or burden on speech, it should be analyzed under the standards applicable to commercial speech.

II. Commercial-speech regulations are subject to intermediate First Amendment scrutiny.

A. This Court has long applied intermediate scrutiny to content-based commercial-speech regulations.

For nearly four decades, the First Amendment standard that applies to restrictions on commercial speech has been clear: The government may regulate such speech where it has "substantial" interests in the regulation, the regulation "advances these interests in a direct and material way," and "the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (citing *Cent. Hudson*, 447 U.S. at 564). This standard—termed intermediate scrutiny or *Central Hudson* review—affords less protection for commercial speech than the strict scrutiny ordinarily applicable to fully protected speech, such as

political, literary, artistic or religious expression. This "common-sense distinction" between commercial and noncommercial speech stems from commercial speech's "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978) (internal quotation marks omitted).

Mr. Tam suggests, however, that because the disparagement provision is "content-based" in the sense that its application turns on the content of a mark, the Court should apply the strict scrutiny normally applicable to restrictions on fully protected speech even if it recognizes that the affected speech is commercial. He suggests that any content-based restriction on commercial speech should be treated the same as content-based restrictions on speech about religious or political views. That position fails to acknowledge this Court's decisions recognizing that "regulation of commercial speech based on content is less problematic" than regulation of content-based noncommercial speech. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983). In *Central Hudson* itself, the Court explained that "regulation of [commercial speech's] content" is permissible in part because such "speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation." *Cent. Hudson*, 447 U.S. at 564 n.6. By contrast, "[i]n most other contexts, the First Amendment prohibits regulation based on the content of the message." *Id.*

The argument for strict scrutiny of content-based commercial-speech regulations also runs counter to a line of cases in which this Court has applied intermediate scrutiny to content-based restrictions on lawful,

non-misleading commercial speech. *See, e.g., Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 176, 183–84 (1999) (striking down a statute that forbade broadcast advertising of casino gambling as applied to advertisements in jurisdictions where such gambling was legal); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478, 482, 488 (1995) (invalidating federal law that prohibited labels for beer, but not wine or distilled spirits, from displaying alcohol content); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620, 635 (1995) (upholding rule prohibiting attorneys from sending certain written solicitations to prospective clients that "relate[d] to an accident or disaster involving the person to whom the communication [was] addressed or a relative of that person"); *Bolger*, 463 U.S. at 61, 68–69 (holding unconstitutional as applied a statute that prohibited unsolicited advertisements for contraceptives); *In re R.M.J.*, 455 U.S. 191, 194, 205–07 (1982) (holding unconstitutional a rule that barred attorney advertisements from identifying jurisdictions in which attorneys were licensed). In each case, the restrictions turned on the "subject matter" of the speech and the identity of the speaker. Yet in each case, the Court held that the restrictions were subject to intermediate scrutiny.

Indeed, *Central Hudson* itself struck down a regulation that banned all "advertising intended to stimulate the purchase of utility services," a content-based restriction that, under Mr. Tam's position, would be subject to strict scrutiny. *Cent. Hudson*, 447 U.S. at 559 (internal quotation marks omitted). Thus, Mr. Tam's argument for strict scrutiny suggests that the Court applied the wrong standard in the very case that gave First Amendment intermediate scrutiny its name.

B. *Sorrell* and *Reed* do not alter the intermediate scrutiny standard for restrictions on commercial speech.

Mr. Tam's argument for strict scrutiny hinges on this Court's recent decisions in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *Sorrell v. IMS Health*, 564 U.S. 552. Those decisions, however, do not step back from the Court's well-established distinction between commercial and noncommercial speech, even for restrictions that are content-based.

In *Sorrell*, the Court struck down on First Amendment grounds a Vermont law that prohibited, with limited exceptions, "pharmacies, health insurers, and similar entities from disclosing or otherwise allowing prescriber-identifying information to be used for marketing" and "pharmaceutical manufacturers and detailers from using the information for marketing." 564 U.S. at 563. The Court held that the law imposed a "speaker- and content based burden on protected expression" by allowing the use of information by other entities, such as "private or academic researchers," and for non-marketing purposes, such as "educational communications." *Id.* at 564. The Court therefore concluded that "heightened judicial scrutiny [was] warranted." *Id.* at 565.

Importantly, however, the Court went on to note the two types of "heightened" scrutiny that could apply to the speech at issue: "a special commercial speech inquiry or a stricter form of judicial scrutiny" for noncommercial speech. *Id.* at 571. The Court concluded that it was unnecessary to decide whether the speech at issue was commercial or noncommercial because, even under the less stringent "commercial speech inquiry," the law was unconstitutional. *See id.*

at 571–72 (citing *Cent. Hudson*, 447 U.S. at 566). Far from announcing a new rule, *Sorrell*'s repeated distinction between the standard for commercial speech and the "stricter" standard for noncommercial speech supports the continued application of intermediate scrutiny to commercial speech.

As the *Sorrell* opinion makes clear, the phrase "heightened scrutiny" does not refer to strict scrutiny. *Sorrell*'s application of intermediate scrutiny contradicts any such reading, and many of the Court's other opinions demonstrate that "heightened scrutiny" is a *generic* term indicating a level of scrutiny higher than rational-basis scrutiny, including both intermediate scrutiny and strict scrutiny. For example, the Court's equal protection precedents frequently use the term "heightened scrutiny" to describe the intermediate scrutiny applicable to gender classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533, 555 (1996); *Clark v. Jeter*, 486 U.S. 456, 463, 465 (1988). In the First Amendment area, the Court has likewise referred to the intermediate scrutiny applied to limits on political contributions as a form of "heightened judicial scrutiny." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). The Court's opinion in *Sorrell* uses the term "heightened scrutiny" in the same way—as a general description of scrutiny above a rational-basis test—not as another way of saying strict scrutiny.

Likewise, *Reed* offers no support for application of strict scrutiny to commercial-speech regulations. *Reed* struck down a local law that prohibited outdoor signs without a permit but exempted twenty-three categories of signs, including political and ideological signs and temporary directional signs of short duration. *See*

135 S. Ct. at 2224–25. The law did not, however, exempt signs that the plaintiffs—a church and its pastor—sought to display for extended periods to publicize the time and location of upcoming church services. *Id.* at 2225. The Court cited *noncommercial-speech* cases for the proposition that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. The Court cited *Sorrell*, a commercial-speech case, only in defining the "commonsense meaning of the phrase 'content based.'" *Id.* at 2227. The Court explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* (citing *Sorrell*, 564 U.S. at 565). The Court thus found that the town ordinance in *Reed* was content-based because it "single[d] out specific subject matter for differential treatment." *Id.* at 2230. The Court then applied strict scrutiny to the ordinance as a content-based regulation of *noncommercial speech*. *Id.* at 2231.

Critically, *Reed* did not hold—or even discuss the possibility—that strict scrutiny would apply to content-based *commercial-speech* restrictions. Surely if the Court intended to overrule its many decisions distinguishing commercial speech from noncommercial speech, its opinion would acknowledge such a momentous aspect of the decision. *Reed* does not do so. Indeed, the Court's opinion does not use the term "commercial speech" even once.

C. Applying strict scrutiny to content-based commercial-speech regulations is neither necessary nor proper.

The view that content- or speaker-based commercial-speech restrictions are subject to strict scrutiny has exceptionally far-reaching implications because commercial-speech restrictions are always, or virtually always, content- or speaker-based in the broad sense in which the Court has used the term in *Reed* and *Sorrell*. Commercial-speech restrictions, by definition, apply to commercial messages and commercial speakers, and usually to particular types of speakers and messages (for example, the written solicitations from attorneys that were at issue in *Went for It*). More broadly, "the classification of speech between commercial and noncommercial is itself a content-based distinction." *CTIA—The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 n.9 (N.D. Cal. 2015), *app. filed*, No. 16-15141 (9th Cir. Feb. 1, 2016). As one scholar has observed, "this argument, that a statute which treats marketing differently than other speech, is constitutionally infirm *on that ground*, makes a hash of the commercial-speech doctrine because, by definition, the commercial-speech doctrine is applicable only to a specific type of content—commercial content." Tamara Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. Bus. & Tech. L. 1, 20 (2016).

1. Applying strict scrutiny to commercial speech would threaten a broad range of commonsense regulations.

Applying strict scrutiny to content-based commercial-speech restrictions—in addition to making a mess of the case law—would risk devastating consequences

for the government's ability to adopt commonsense marketplace regulations. Regulations of commercial speech typically apply to specific market participants, such as food manufacturers, debt collectors, and drug companies, and they deal with problems unique to industries in which those participants operate. For example, federal law limits the circumstances in which food manufacturers can make claims about health benefits of their products, 21 C.F.R. § 101.14, or advertise the addition of vitamins to infant formula, *id.* § 107.10(b). It forbids debt collectors from advertising the sale of a debt to coerce a debtor to pay it and from publishing lists of consumers who refuse to pay debts. 15 U.S.C. § 1692d(3)–(4). If content-based commercial-speech restrictions are subject to strict scrutiny, all these restrictions would have to satisfy such scrutiny because they apply "to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227.

In the disclosure context, too, the government frequently mandates speech on a particular subject and requires that commercial actors use specific language. For example, vehicle manufacturers must label, in accordance with Environmental Protection Agency rules, each vehicle with its fuel economy. 49 U.S.C. § 32908(b). Drug manufacturers must include "black box" warnings on labels of certain drugs to emphasize particular hazards. 21 C.F.R. § 201.57. And food manufacturers must disclose nutritional information about their products. *Id.* § 101.9.

The government would have a much higher burden to justify rules like these if they were deemed content-based and subject to strict scrutiny. It "is the rare case" in which the government "demonstrates

that a speech restriction is narrowly tailored to serve a compelling interest," as required to satisfy strict scrutiny. *Williams-Yulee*, 135 S. Ct. at 1665–66. Indeed, in the noncommercial-speech context, the Court has described content-based restrictions as "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Applying such scrutiny to content-based commercial-speech restrictions could obliterate many laws and regulations that are longstanding and critical to the protection of consumers.

Indeed, one need look no further than the statute at issue here to see the potential consequences of applying strict scrutiny to content-based commercial-speech rules. In addition to forbidding registration of disparaging marks, the statute also prohibits registration of "deceptive" marks, 15 U.S.C. § 1052(a); marks containing certain "geographical indications" with respect to wine or spirits, *id.*; marks comprising flags and insignia of the United States and other domestic and foreign governmental entities, *id.* § 1052(b); marks using names or images of living individuals, or of United States Presidents, living and dead, *id.* § 1052(c); marks that are "confusing" in similarity to other marks, *id.* § 1052(d); marks that are "merely descriptive" or "functional," *id.* § 1052(e); and, subject to certain procedural requirements, marks that would "be likely to cause dilution by blurring or dilution by tarnishment" of other marks, *id.* § 1052(f).

All of these limitations are based on the *content* of a mark and, if Mr. Tam's broadest arguments were correct, would be subject to strict scrutiny. These longstanding and useful limits on registration might survive such scrutiny, but they might not. In the realm of fully protected speech, for example, limita-

tions on confusing or deceptive speech, or speech that appropriated a national symbol, would be unlikely to satisfy strict scrutiny. *See United States v. Alvarez*, 132 S. Ct. 2537 (2012). That such limitations are generally permissible in the realm of commercial speech, *see id.* at 2547 (plurality), is in large measure attributable to the less exacting, though still heightened, standard applicable to commercial-speech regulation. But even if these limits on registration might survive strict scrutiny, the fundamental question is whether there is reason to apply such strong medicine to laws affecting the commercial use of words. This Court's decisions have consistently indicated that the answer to that question is no.

2. Applying strict scrutiny to commercial speech would harm protection of pure speech and is unnecessary to protect commercial speech.

Applying strict scrutiny to content-based commercial-speech restrictions could also unnecessarily create unintended, harmful consequences for the protection of noncommercial speech. "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U.S. at 456. That is, if strict scrutiny were applied to the many valuable commercial-speech regulations on which the public has depended for decades, the inclination of courts to uphold sensible marketplace rules might lead them to relax strict scrutiny as we know it, to the detriment of speakers engaged in fully protected expression.

That result would be particularly troubling because application of strict scrutiny is not necessary to curb true government excesses in the realm of commercial speech. *Central Hudson* intermediate scrutiny is already quite protective, perhaps in some cases overly protective, of commercial-speech interests. For example, in this case, assuming that the government's arguments against treating the disparagement provision as restricting or burdening speech fail, the statute can be sustained under *Central Hudson* only if the interests identified by the government (*see* Pet. Br. 48–50) are not only legitimate, but also "substantial," and if the statute advances them "directly" and in a "reasonabl[y] proportion[ate]" way. *Edenfield*, 507 U.S. at 767.

The requirement of a substantial government interest gives very significant protection to the interests Mr. Tam seeks to assert. This Court held in *Bolger v. Youngs Drug Products Corp.* that the interest in suppressing offensive speech does not qualify as a substantial, or even legitimate, government interest with respect to commercial speech any more than it does with respect to fully protected speech. 463 U.S. at 71–72. Thus, if the disparagement provision is subject to First Amendment scrutiny, the determinative issues are whether the government's interests can meaningfully be distinguished from the one rejected in *Bolger*, whether they are substantial, and whether the disparagement provision advances them directly and proportionately enough to be sustained under the *Central Hudson* test.

On those questions we express no view, in part because, in light of the parties' focus on other issues, the government's brief does not present a fully formed

argument concerning the application of intermediate scrutiny to the statute in light of the interests the government asserts are served by the provision. That omission is understandable given the government's theory that the case involves no restriction or burden on speech of any kind necessitating review under any First Amendment standard.

If, however, the Court concludes that First Amendment scrutiny *is* required, application of the appropriate intermediate scrutiny will be critical to the outcome. Unlike strict scrutiny, which the government has never asserted this statutory provision could survive, intermediate scrutiny would not necessarily condemn the provision. Under such circumstances, it would be imprudent to sustain a decision striking down a federal statute as facially unconstitutional without receiving briefing fully addressing the application of the proper level of scrutiny. Thus, the Court may wish to request additional briefing if it concludes that the statute restricts or burdens commercial speech.

CONCLUSION

If the Court finds that the disparagement provision restricts or burdens Mr. Tam's speech, it should evaluate the constitutionality of that restriction or burden under the intermediate scrutiny standard applicable to regulation of commercial speech.

Respectfully submitted,

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